

**GUIDELINES FOR PROBATION VIOLATION
PROCEEDINGS IN THE SUPERIOR COURT
EFFECTIVE FEBRUARY 1, 2016**

Section One: **Scope and Purpose**

These guidelines prescribe procedures in the Superior Court to be followed upon the allegation of a violation of an order or condition of probation imposed in a criminal case after a finding of guilty or after a continuance without a finding. These guidelines do not apply to an alleged violation of pretrial probation or other conditions of pretrial release.

The purpose of the guidelines is to ensure that judicial proceedings undertaken on an allegation of a violation of probation are conducted in accordance with applicable law, and in a prompt, uniform and consistent manner.

Section Two: **Definitions**

In construing these guidelines, the following terms shall have the following meanings:

"Continuance without a finding" means the order of a court, following a formal submission and acceptance of a plea of guilty upon the defendant's agreement to the Commonwealth's evidence or a finding of sufficient facts, whereby a criminal case is continued to a date certain without formal entry of a guilty finding.¹ A court, in imposing a continuance without a finding, may include a term of probation with conditions, the violation of which may result in a revocation of the continuance and the entry of a finding of guilty and imposition of sentence.

"District Attorney" means the criminal prosecuting authority responsible for the criminal case in which a term of probation was imposed, to include the Attorney General.

"General conditions of probation" means those conditions of probation that are imposed as a matter of course in every probation order, as set forth in the official form promulgated for such orders.

"Notice of Surrender" means the written form issued by the Probation Department alleging a violation of probation and setting forth the precise grounds for a violation proceeding.

"Probation order" means the formal, written court order whereby a defendant is placed on probation and which expressly sets forth general and/or special conditions of probation.

¹ *Commonwealth v. Powell*, 453 Mass. 320 (2009); G.L. c. 278, § 18.

"Pretrial Probation" means the probationary status of a defendant pursuant to a probation order issued prior to an adjudication of a criminal case.

"Revocation of probation" means the revocation of a probation order by a judge following an adjudication of a violation of a probation order.

"Special condition of probation" means any condition of probation imposed by a judge as part of a probation order in addition to general conditions of probation.

"Stipulation to violation" means a knowing and voluntary admission by a probationer that he/she has violated the probation order as alleged in the Notice of Surrender.

"Surrender" means the procedure, consistent with the instant Guidelines, by which a probation officer requires a probationer to appear before the court on an allegation of probation violation.

Section Three: Commencement of Violation Proceedings

A. Procedure

Violation Proceedings shall commence upon the filing, by a probation officer, of a written Notice of Surrender.² A Notice of Surrender shall be prepared in advance of Violation Proceedings except where the probationer has been arrested by the probation officer in accordance with G. L. c. 279, § 3, in which case the Notice of Surrender shall be prepared, filed with the court, and served on the probationer when the probationer first appears before the court. The Notice of Surrender shall be in a form promulgated by the Probation Department and shall identify the probationer by name, the offense or offenses for which the probationer was placed on probation, and the court and county where the offense was adjudicated and probation imposed. It shall specifically describe the basis for an alleged violation, shall include all alleged violations of the probation order known to the probation officer, and shall notify the probationer of the date and time of the Initial Hearing in the probation court.

B. Mandatory Commencement of Violation Proceedings

The probation officer shall issue a Notice of Surrender (1) when a probationer has been charged with a new criminal offense by way of complaint or indictment; (2) where the judge issuing the probation order directed that a Notice of Surrender is to issue upon any alleged violation of one or more conditions of probation; or (3) when the commencement of such

² *Commonwealth v. Wilcox*, 446 Mass. 61, 66 (2006); *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990) ("When a violation is alleged, the probation officer "surrenders" the defendant to the court, subjecting the defendant to possible revocation of his probation.")

proceedings is required by statute.

C. Discretionary Commencement of Violation Proceedings

Except as set forth above, the probation officer may issue a Notice of Surrender for an alleged violation of a general and/or special condition of probation if, in the discretion of the Probation Department, the alleged violation is unlikely to be successfully resolved through an administrative hearing or other intermediate interventions.

D. Amendment and Withdrawal

A Notice of Surrender may be amended at any reasonable time before a final surrender hearing, provided service is made in accordance with these guidelines. A Notice of Surrender may be withdrawn only with leave of court, provided, however, that a judge or magistrate may order the termination of the proceedings at any time in the exercise of discretion, after giving the Probation Department an opportunity to be heard.

Section Four: Service of a Notice of Surrender

A Notice of Surrender shall be served on the probationer by in-hand service or by first-class mail to the last known residential address that the probationer has provided to his probation officer. When a probationer is brought before the court where the probationer is under supervision as the result of his arrest by the probation officer pursuant to G. L. c. 279, § 3, or is in custody as the result of a separate criminal case, service shall be made in-hand and an initial hearing conducted. The manner of service of the Notice of Surrender shall be noted in the court docket. Out-of-court service other than by first-class mail shall require a written return of service. Where a probationer appears on a new criminal offense in a court other than the court that imposed or is supervising the probationer, the issuance and service of a Notice of Surrender shall be governed by Section Seven, Special Provisions For Commencement of Violation Proceedings based on a New Criminal Offense.

Section Five: Initial Violation Hearing

Except for good cause, an Initial Violation Hearing shall be scheduled not later than fourteen days after the issuance of a Notice of Surrender. Upon the probationer's initial appearance before the probation court based on the issuance of a Notice of Surrender, a judge or magistrate shall confirm that the probationer has received the written Notice of Surrender, shall appoint counsel in the event the probationer is indigent and the offense for which probation was imposed has a potential penalty of incarceration, shall schedule a date and time for a final Violation Hearing, and shall determine whether the probationer should be detained pending a final hearing, or whether bail or release on personal recognizance (with or without conditions)

should be imposed.³ The probationer shall have the right to counsel at the time any detention, bail or release determination is made. Nothing herein shall preclude a court, utilizing a HOPE/MORR model of probation supervision, from detaining a probationer for a discrete period of time in accordance with that model.

A probationer shall not be detained pending a final Violation Hearing unless a judge or magistrate finds probable cause to believe that the probationer has violated a condition of his probation.⁴ A probationer shall be entitled upon request to a preliminary violation hearing, to be held not more than seven days after the initial appearance, unless the probationer consents to a later date. The issues to be determined at such hearing are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and if so, whether the probationer should continue to be held on bail or without right to bail. Where the violation is based on the issuance of an indictment for a new criminal offense, the indictment shall constitute proof of probable cause.⁵ The hearing shall be conducted by a judge or magistrate in open court and shall be recorded. At such hearing the probation officer shall present evidence to support a finding of probable cause, and the probationer or his counsel shall be entitled to be heard in opposition. The District Attorney may, upon request of the probation officer, assist the probation officer in the presentation of evidence. If probable cause is found, a final violation hearing shall be scheduled by the court and the probationer shall be given notice in open court of the final hearing date. If probable cause is not found, the judge or magistrate may terminate the proceedings or may schedule a final hearing, but the probationer shall not be held in custody pending the final hearing.

Section Six: Final Violation Hearing

A. Scheduling the Hearing

A final Violation Hearing shall be scheduled not earlier than seven days after the Initial Violation Hearing unless the probationer assents to an earlier hearing, and not later than thirty days thereafter unless good cause is shown. Where the probation surrender involves an alleged commission of a new criminal offense, a continuance to permit resolution of the case involving

³ No authority explicitly establishes that bail either may or may not be set in probation violation proceedings. But see *Commonwealth v. Ward*, 15 Mass. App. Ct. 388, 393 (1983); *Rubera v. Commonwealth*, 371 Mass. 177, 184 n.3 (1976) (both suggesting that the setting of bail is appropriate).

⁴ *Fay v. Commonwealth*, 379 Mass. 498, 504 (1980)(right to a hearing before detention pending a final hearing is ordered); *Commonwealth v. Odoardi*, 397 Mass. 28, 33 (1986).

⁵ *Stefanik v. State Board of Parole*, 372 Mass. 726 (1977).

such new offense shall not ordinarily constitute good cause.⁶

B. Adjudicatory Determination

A final violation hearing shall consist of two parts: (1) an evidentiary hearing to adjudicate whether the alleged violation has occurred; and (2) upon a finding of violation, a dispositional hearing. The probationer shall be entitled to the assistance of counsel, but may waive counsel upon a determination by the court that such waiver is made knowingly and voluntarily.

The probation officer shall have the burden of proving that a probationer has violated one or more conditions of probation by a preponderance of evidence. At the request of a probation officer, or when required by G. L. c. 279, § 3, the District Attorney may participate in the presentation of evidence or examination of witnesses. Hearsay evidence shall be admissible at a Violation Hearing as permitted under Sections 802 through 804 of the Massachusetts Guide to Evidence, or when determined by the judge to be substantially reliable.⁷ The probationer shall have the right to cross examine any witnesses called by the probation officer, including the probation officer; the right to call witnesses; the right to present evidence favorable to the probationer; the right to testify; and the right to make closing argument on the issue of whether a violation has been proved by a preponderance of evidence.

The court may accept a probationer's stipulation to a violation of probation as alleged in the Notice of Surrender if the judge finds after colloquy that the probationer is tendering a knowing and voluntary stipulation. However, the court shall not be bound by any agreement between the probationer and probation officer or District Attorney regarding the disposition to be imposed. A probationer shall not be entitled, as a matter of right, to withdraw a stipulation after it has been accepted by the court.

Upon the completion of the evidence and closing arguments, the court shall promptly determine whether a violation of probation has been proved by a preponderance of evidence. If the court finds that no violation has been proved, the probationer shall be restored to probation according to the terms and conditions previously imposed. If the court finds that a violation has been proved the judge shall make findings on the record as to the condition or conditions that

⁶ The practice of a probation surrender proceeding "tracking" a new criminal case is discouraged by these guidelines. However, a judge or magistrate may decide that good cause exists to permit tracking, for example, when the new criminal case is particularly complex or sensitive, such that providing discovery or presenting evidence at a final hearing could compromise the integrity of the new case. Such a determination shall be made in open court and entered on the record.

⁷ *Commonwealth v. Durling*, 407 Mass. 108, 114-118 (1990); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973).

have been violated and the facts found in making the determination.⁸

C. Dispositional Determination

Upon a finding that the probationer has violated one or more conditions of probation, the judge shall permit the probation officer and probationer, and where required by statute, the District Attorney, to make a recommendation regarding the appropriate sanction to be imposed by the court. Thereafter, the court shall impose a disposition based on the circumstances of the crime for which the probationer was placed on probation and its impact on any person or on the community, the occurrence of any prior violations of probation, the probationer's overall performance while on probation, the public safety, the effect of a sentence on the probationer's chances for rehabilitation, and any other mitigating or aggravating facts or circumstances. The court may consider information that was available to the judge who issued the probation order as well as information that has become available since the order was issued. The court, however, may not punish the probationer for criminal conduct which forms the basis of the violation.⁹ The court may: (1) restore the probationer to his existing probationary term with such admonition or instruction as it may deem appropriate; (2) terminate the probation order and discharge the probationer; (3) extend the term of probation and modify the terms or conditions of probation; or (4) revoke probation in whole or in part.¹⁰ Where probation is revoked on an offense for which a sentence had been imposed, the execution of which was suspended, the original sentence shall be ordered executed forthwith,¹¹ subject to a stay granted pending an appeal in accordance with Mass. R. Crim. P. 31, or at the court's discretion upon a probationer's request for a brief period of time to attend to personal affairs prior to the commencement of a sentence of incarceration. In the event probation is revoked on an offense for which no suspended sentence had previously

⁸ *Fay v. Commonwealth*, 379 Mass. 498, 504-505 (1980)(findings of fact not required to be in writing provided that they are made and announced on the record in the probationer's presence).

⁹ *Commonwealth v. Doucette*, 81 Mass. App. Ct. 740, 745 (2012); *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 577 n.8 (2001).

¹⁰ A partial revocation of probation occurs where the probationer has been placed on probation on multiple offenses and the court revokes probation and imposes a sentence as to one or more offenses, and continues probation as to other offenses, typically to run from and after the committed sentence.

¹¹ *Commonwealth v. Holmgren*, 421 Mass. 224 (1995); see also, *Commonwealth v. Bruzzese*, 437 Mass. 606 (2002)(where defendant was subject to multiple suspended sentences as part of a single sentencing structure, revoking probation on less than all charges violates double jeopardy principles)

been imposed, the court shall impose a sentence or other disposition as provided by law.¹²

Upon a finding of a violation of a probation order resulting from a continuance without a finding, the judge may terminate the probation order and the continuance without a finding and enter a dismissal on the underlying case, return the probationer to the same terms and conditions of probation with such admonitions or instructions as the judge deems appropriate, modify the continuance without a finding and modify the conditions of probation including the duration of the continuance, or terminate the continuance without a finding and enter a guilty finding and impose a sentence or other disposition as provided by law.

Section Seven: Special Provisions For Commencement of Violation Proceedings based on a New Criminal Offense.

Whenever a person on probation is charged with a new criminal offense, the probation officer in the criminal court where the new offense is pending ("criminal court") shall immediately notify the Probation Department in the court where the person is subject to probation supervision ("probation court"). Said notification shall be made in accordance with policies of the Commissioner of Probation, or any policy, administrative order or standing order of the Chief Justice of the Trial Court. In order to comply with the mandatory provisions of Section 3(B), the chief probation officer or his designee in the probation court may order the issuance of a Notice of Surrender in the form set forth herein, to be served on the probationer by a probation officer in the criminal court, ordering the probationer to appear for an Initial Violation Hearing in the probation court at a fixed date and time.

Alternatively, the chief probation officer or his designee in the probation court may also seek the issuance of a warrant from the probation court pursuant to G.L. c. 279, § 3. In the event a warrant issued by the probation court is lodged at the criminal court or, where the probationer has been held in detention or in lieu of posted bail at a jail or house of correction, the clerk of the probation court shall, upon request, promptly issue process to bring the probationer before the probation court for an Initial Violation Hearing.

¹² A sentence imposed upon the finding of a violation shall not be imposed as punishment for any new crime, but rather as punishment for the offense(s) on which probation was imposed. *Commonwealth v. Odoardi*, 397 Mass. 28, 30 (1986). However, a judge may consider the conduct alleged in the new offense on the issue of the probationer's capacity for rehabilitation.